In the Supreme Court of the United States

October Term, 1959

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (R. 16–29) is reported at 352 F. 2d 848.

JURISDICTION

The judgment of the court of appeals (R. 29–30) was entered on October 29, 1965. A petition for rehearing was denied on November 26, 1965 (R. 31). The petition for a writ of certiorari was filed on December 16, 1965, and was granted on March 21, 1966, limited to Question 1 (R. 32; 383 U.S. 942). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

This Court limited its grant of certiorari to Question 1 of the petition, which reads as follows:

> Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965), overrule *United States* v. *Kahriger*, 345 U.S. 22 (1953) and *Lewis* v. *United States*, 348 U.S. 419 (1955)?

STATUTES INVOLVED

Internal Revenue Code of 1954.

Section 4401(a) provides:

Wagers.

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

Section 4411 provides:

Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Section 4412 provides:

Registration.

(a) Requirement.

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.

Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.

In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

Section 4421 provides:

Definitions.

For purposes of this chapter—

(1) Wager.

The term "wager" means—

(A) any wager with respect to a sports event or contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

Section 4422 provides:

Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

Section 4901(a) provides:

Condition precedent to carrying on certain business.

No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(2) (coin-operated gaming devices), 4721 (nar-

cotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

Section 6107 provides:

> *List of special taxpayers for public inspection.*
> In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Connecticut on two indictments charging wagering tax violations (R. 9–12). One indictment charged a conspiracy among petitioner and co-defendants Marchetti and Gjanci wilfully to fail to pay the special occupational tax levied on persons engaged in the business of accepting wagers (R. 1–2). The second indictment, in two counts, charged, in count one, the wilful failure to pay the special occupational tax, as required by 26 U.S.C. 4411, prior to engaging in the business of accepting wagers; and in count two, the wilful failure

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to register, as required by 26 U.S.C. 4412, prior to engaging in the wagering business (R. 3–4).

After the jury verdict,[1] co-defendant Marchetti moved to arrest judgment, in part on the ground that the statutes providing for payment of the special occupational tax and the questions on the registration form violated his Fifth Amendment privilege against self-incrimination (R. 5–6). Petitioner Costello also moved in arrest of judgment, in part on the ground that the statutes violated his Fifth Amendment privilege. He adopted, as part of his motion, co-defendant Marchetti's brief in support thereof (R. 8–9). The trial judge denied the motion (R. 8).

Petitioner was sentenced on the conspiracy count to imprisonment for one year and fined $10,000 (R. 10). He was also sentenced to imprisonment for one year and fined $10,000 on the first of the substantive counts, this sentence to run concurrently with that imposed on the conspiracy count. Sentence on the second substantive count was suspended and petitioner was placed on probation for two years following his release from prison (R. 12).

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[1] The jury found petitioner guilty on all counts (R. 9–12). At the trial, petitioner Costello took the stand in his own defense (Tr. 1076) and denied accepting any wagers (Tr. 1088–1089). Co-defendant Marchetti also took the stand and admitted accepting some bets (Tr. 1130–1131). Co-defendant Gjanci did not testify. The evidence of non-registration and non-payment of the special occupational tax was stipulated to by the parties (Tr. 1035–1036). Petitioner's co-defendants have also sought review in this Court. See *Marchetti* v. *United States*, No. 38, and *Gjanci* v. *United States*, No. 27 Misc., both this Term, *petitions for certiorari pending*.

On appeal the court below held that the claim with respect to the self-incrimination clause was controlled by *United States v. Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, and affirmed the judgment of conviction.[2]

SUMMARY OF ARGUMENT

I

The registration provision of the wagering tax statutes does not violate the privilege against self-incrimination. Registration provisions have commonly and traditionally been included in excise tax measures, and are reasonable incidents to the exercise of the taxing power. An individual may choose whether or not to enter the business of accepting wagers, and the statutes make clear in advance the conditions that attach to the business. Since the registration need relate only to intent to engage in the business in the future and not to past acts, it does not require admissions that might be incriminatory. This reasoning, accepted in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, is not undermined by the decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70. The registration provision in *Albertson* is distinguishable because it involved declarations of

[2] The instant case is one of a series of cases resulting from an extensive investigation of federal wagering tax violations in Connecticut, which, in addition to the cases of petitioner's co-defendants, are presently pending on petitions for certiorari. Nos. 43, 44, 55, 56, 64, this Term. Similar issues are involved in *Driscoll* v. *United States*, No. 97, from Massachusetts, *Grosso* v. *United States*, No. 181, from the Western District of Pennsylvania, and *Conti* v. *United States*, No. 330, from the Southern District of New York, all this Term.

present status rather than of future intent, and disclosure there might have impinged directly on First Amendment rights. Moreover, the registration requirement considered in *Albertson* served no separate and independent governmental purpose apart from the interest in the individual's underlying activity. In the present case, the registration provision has a valid, separate purpose, *i.e.*, to secure information necessary for the collection of the tax.

II

Even if the registration and payment of the wagering taxes might in some circumstances require revealing possibly incriminating information, full protection of the privilege can be afforded by proscribing non-tax uses of the information. Such a resolution would enable the United States to make use of the information for the undeniably legitimate purpose of administering the tax measure and collecting the revenue, while protecting the taxpayer against its use for other and discrete purposes. A similar resolution was adopted by this Court in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, in which there was a similar choice—whether to excuse a witness from the normal duty to testify or to provide an appropriate safeguard against use of that testimony for purposes of prosecution. Both *Murphy* and *United States* v. *Blue,* 384 U.S. 251, show that in circumstances such as here presented a simple exclusionary rule will protect the individual without sacrifice of the separate and independent governmental interest.

ARGUMENT

INTRODUCTION

The wagering tax laws provide for a fifty-dollar occupational tax for those who intend to engage in the business of accepting wagers. 26 U.S.C. 4411. In addition, an excise tax of ten per cent on the gross amount of the wagers accepted is imposed. 26 U.S.C. 4401(a). These taxes were adopted as part of the Revenue Act of 1951, which was designed to meet the extraordinary increase in revenue necessitated by military action in Korea. H. Rep. No. 586, 82d Cong., 1st Sess. 1; S. Rep. No. 781, 82d Cong., 1st Sess. 1. Although the yield has been less than anticipated, in the first full fiscal year of its existence the tax produced 10.5 million dollars in revenue, and 15,710 special occupational tax stamps were purchased. Commissioner of Int. Rev. Ann. Rep. 4, 142–143 (1953). In the last fiscal year, 7,284 occupational tax stamps were purchased and 6.6 million dollars was collected. Commissioner of Int. Rev. Ann. Rep. 115, 125 (1965).

The wagering tax laws provide for the registration of those liable for the fifty-dollar ocupational tax. Registration provisions have long antecedents in the tax field,[3] and, indeed, the registration of those liable for special taxes is an integral feature of the Internal

[3] See, *e.g.*, 1 Stat. 145–178 (delivery of manifests to customs collector and permits to unload imported goods); 1 Stat. 205 (requiring certain distillers to register place of business and storage); 1 Stat. 377 (licensing of retail dealers in certain distilled spirits); 1 Stat. 385 (manufacturers of snuff required to register and list every home or building in which the business would be carried on).

Revenue Code.[4] Obviously, without information such as the name, address, and location of business of one liable for a special tax, collection would be extremely difficult, if not impossible. Thus, this Court has consistently upheld registration requirements as a reasonable incident to the exercise of the taxing power, without regard to the legality of the business or underlying activity involved. See *United States* v. *Sanchez,* 340 U.S. 42 (marihuana); *Sonzinsky* v. *United States,* 300 U.S. 506 (firearms); *Nigro* v. *United States,* 276 U.S. 332, and *United States* v. *Doremus,* 249 U.S. 86 (narcotics).

The wagering tax laws also provide for listing and public disclosure of the names of registrants. 26 U.S.C. 6107. Like registration requirements, provisions for public disclosure are a common feature of revenue measures.[5] In addition to disclosure of registrants for certain occupational taxes,[6] other more gen-

[4] See 26 U.S.C. 7011. Registration provisions in aid of collecting special taxes have been imposed in relation to numerous occupations and business activities, *e.g.*, § 4101 (those subject to tax on petroleum products); § 4222 (registration regarding certain tax-free sales by manufacturers); § 4722 (those engaged in dealing in narcotic drugs); § 4753 (those who deal in marihuana); § 4804(d) (manufacturers of white phosphorus matches); §5171–5172 (registration of distilleries); § 5179 (registration of stills); § 5502 (manufacturers of vinegar); § 5802 (importers, manufacturers, and dealers in firearms); § 5841 (those who possess certain firearms).

[5] See, *e.g.*, 1 Stat. 205 (distillers required to paint conspicuously on their place of business the words "Distiller of Spirits"); 17 Stat. 403 (collectors required to post conspicuously, for public inspection, alphabetical lists of all those who paid special taxes).

[6] See, *e.g.*, § 4461 (those who maintain for use or permit use of coin-operated amusement or gaming devices); § 4471

eral provisions for public scrutiny of taxpayers are found throughout the Revenue Code. See, *e.g.*, Section 6103(f) (lists of taxpayers); Section 6104 (returns of certain tax-exempt organizations); Section 6105 (lists of those who have been granted excess profit relief).[7] These provisions serve, among other things, to facilitate collection of revenue by stimulating voluntary compliance with the tax laws.[8]

(those who operate a bowling alley, billiard room or pool room); § 4721 and § 4702(a)(2)(C) (those who deal in narcotic drugs); § 4751 (dealers in marihuana); § 4821 (manufacturers or dealers in renovated or adulterated butter); § 4841 (manufacturers or dealers in filled cheese); § 5081 (those who rectify distilled spirits or wines); § 5091 (brewers of beer); § 5101 (manufacturers of stills); § 5111 (wholesale dealers in liquors, wines and beer); § 5121 (retail dealers in liquors, wines and beer); §5801 (dealers in certain firearms). Under § 6806(c), a registrant must post the wagering tax stamp in his place of business or carry it with him.

[7] Section 6107 differs somewhat, however, in its specific mention of making lists of registrants for various special taxes available to local prosecutors. It should be noted that this directive was enacted long before the wagering tax laws, see 34 Stat. 387 (1906), to overcome the Treasury regulation involved in *Boske* v. *Comingore*, 177 U.S. 459.

[8] The wagering tax was upheld as a proper exercise of the taxing power in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419. See also *Ingram* v. *United States*, 360 U.S. 672; *United States* v. *Calamaro*, 354 U.S. 351. To be sure, in enacting the measure, some members of Congress may have had motives collateral to the raising of revenue, but, as this Court has often held, such motives are not subject to examination and "a tax is not any the less a tax because it has a regulatory effect." *Sonzinsky* v. *United States*, *supra*, 300 U.S., at 513. See also *License Tax Cases*, 5 Wall. 462. However, the legislative history substantiates that Congress sought to raise revenue by getting at a previously untapped source. See 97 Cong. Rec. 12231–12243 (1951); H. Rep. No. 586, *supra*, at 55; S. Rep. No. 781, *supra*, at 113. Because of the

I

SINCE THE REGISTRATION REQUIREMENT IS A KNOWN CONDITION TO THE VOLUNTARY ACT OF ENTERING THE BUSINESS OF ACCEPTING WAGERS, IT DOES NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION

The federal wagering[9] tax statute's requirements of registration and payment of a special occupational tax, at issue here, do not result in a violation of the registrant's privilege against self-incrimination. Conversely, non-registration and non-payment cannot be justified by invoking the privilege. It is obvious that the requirements of the taxing measure do not conflict with the Fifth Amendment in places where gambling is lawful.[10] However, even in the far more common case where gambling is illegal under State or local law, we submit that the privilege is not infringed. No one is compelled to enter or to engage in the wagering business. And any individual who chooses to do so is plainly warned in advance that he will have to provide information which he might

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limited grant of certiorari, which did not extend to Question 2 of the Petition relating to the taxing power and the Tenth Amendment, we have assumed that the validity of the tax as a tax is not at issue.

[9] "Wagering," as defined by Section 4421 of the Revenue Code, *supra*, pp. 3–4, does not include the full scope of gambling activities generally proscribed by State or local law.

[10] If the federal government imposed a tax upon a business only because and to the extent that it was illegal, the validity of the measure as an exercise of the taxing power would be subject to serious question. See *United States* v. *Constantine*, 296 U.S. 287, in which the Court held unconstitutional a special tax imposed only upon those liquor dealers who engaged in business where prohibited by local or municipal law.

prefer to keep private.[11] Thus, he has the choice of entering into the business, subject to a concomitant duty to disclose information relevant to collection of the tax, or of staying out of the business, and thereby insuring that his private activities are as private as he desires them to be. The statute, in 26 U.S.C. 4901, makes the payment of the special occupational tax, for which registration is required, a "condition precedent" to engaging in the business. It provides in part:

> (a) Condition precedent to carrying on certain business.
>
> No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering) * * * until he has paid the special tax therefor.

This section makes clear the conditions pertaining to the business of accepting wagers. A person contemplating entry into the business obviously considers, if his State prohibits gambling, that he will be engaged in illegal activity. Having voluntarily elected to do so, however, he should not be heard to complain of the requirements of preexisting federal law. We stress that the information required by registration need relate only to the future, considering

[11] Disclosures—often highly detailed—are required under federal law of those who choose to engage in many occupations. See, *e.g.*, 15 U.S.C. 80b–3 (investment advisers); 47 U.S.C. 301 *et seq.* (radio stations); 49 U.S.C. 1371 (air carriers); 49 U.S.C. 306 *et seq.* (motor carriers); 2 U.S.C. 267 (lobbyists); 29 U.S.C. 432 (officers and employees of labor organizations); 29 U.S.C. 433 (reports of employers); 7 U.S.C. 203 (stockyard dealers or market agencies).

the form now in use; it does not necessarily require admission of any past acts that might be unlawful.[12]

This was the rationale of both *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419. In the *Kahriger* case, this Court stated, 345 U.S., at 32–33:

> * * * If respondent wishes to take wagers subject to excise taxes under § 3285 [now § 4411] *supra*, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions.

And in *Lewis*, this Court said, 348 U.S., at 422–423:

> If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, * * * he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshhold.

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[12] The questions on the form now in use, adopted subsequent to the decisions in *Kahriger* and *Lewis*, are phrased in the alternative, *e.g.*, "Are you or will you be engaged in the business of accepting wagers on your own account?" (see Appendix, *infra*). The old form (see R. 7), in use prior to 1963, asked, "Are you engaged in the business * * *?" Thus, on the present form an affirmative answer is at most equivocal.

> They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.[13]

The rationale of *Kahriger* and *Lewis* is as valid today as it was when formulated by this Court.[14]

We recognize that in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, it could have been said that members of the Communist Party had a period within which to get out of the party, and to that extent had a choice whether or not to subject themselves to the duty to register. Nevertheless, we believe that case is distinguishable. In *Albertson*, it was clear that the registration requirement related to present status, *i.e.*, party membership, rather than to future intent. In addition, since membership in the Communist Party without knowledge of its un-

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[13] Similarly, in *Fougera & Co.* v. *City of New York*, 224 N.Y. 269, 279, Judge Cardozo reasoned:

> * * * The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. He is simply notified of the conditions upon which he may do business in the future. He makes his own choice. To such a situation, the privilege against self-accusation has no just application. [Citations omitted].

[14] To the extent that the Fifth Amendment decision in *Kahriger* was based on considerations of dual sovereignty, its validity has been undermined by more recent developments in the scope of the privilege. See *Malloy* v. *Hogan*, 378 U.S. 1; *Murphy* v. *Waterfront Commission*, 378 U.S. 52. The *Lewis* case, however, has not been so affected, for it involved only the federal government, in that the defendant was a resident of the District of Columbia where gambling was prohibited by an act of Congress. See 348 U.S., at 420; *id.*, at 423–424 (Black, J., dissenting).

lawful purposes or intent to further them is constitutionally protected (see *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 393; *Noto* v. *United States*, 367 U.S. 290, 299–300; *United States* v. *Brown*, 381 U.S. 437, 455–556), compulsory disclosure of membership—with its hazard of prosecution—might deter lawful association. No such countervailing constitutional interest is involved when disclosure pertains not to speech or association but to gambling.

Moreover, the wagering tax registration provision serves a valid governmental interest—to make possible the collection of the tax. Indeed, the provision was characterized in *Kahriger* as "directly and intimately related to the collection of the tax and * * * 'obviously supportable as in aid of a revenue purpose' " (345 U.S., at 31–32). That valid purpose distinguishes it from the registration requirement involved in *Albertson*, which, in light of the determination of the Subversive Activities Control Board, served little purpose, this Court concluded, other than to require the revelation of incriminatory information "in an area permeated with criminal statutes" (382 U.S., at 79) designed to regulate the very activity the registrants were required to admit, *viz.*, membership in subversive organizations. In other words, in *Albertson* there was no reason for the information apart from the activity directly regulated and deemed criminal. In contrast, the registration provision here involved has a valid purpose—to secure information necessary for the collection of taxes—quite apart from any con-

sideration whether the underlying activity of the registrant is legal or not.

We urge, therefore, that *Albertson* does not require a departure from the holdings of *Kahriger* and *Lewis* and that the Court should adhere to those decisions.

II

EVEN ASSUMING THAT REGISTRATION WOULD PROVIDE INFORMATION THAT MIGHT BE INCRIMINATORY IF USED IN A PROSECUTION FOR THE UNDERLYING ACTIVITY, THE PROPER REMEDY IS TO BAR SUCH USE, RATHER THAN TO UPHOLD A REFUSAL TO REGISTER

If, contrary to the views stated above and the prior holdings of this Court, it should now be concluded that registration under the wagering tax laws carries with it a sufficiently substantial danger of implicating the registrant in past or contemporaneous criminal activity so as to bring into play the protections of the Fifth Amendment, it by no means follows that the entire federal taxing scheme, or even the registration requirement, must fall. We shall assume *arguendo* in this part of the brief that the apprehension of incrimination is not insubstantial. In that circumstance, we urge, the answer to the question posed in this case is not that refusal to register is therefore warranted. Rather, the proper accommodation should be to place appropriate limits upon the use of the information obtained as a result of the registration statement.

A. NO INCRIMINATION RESULTS FROM REGISTRATION IF THE INFORMATION IS USED SOLELY FOR TAX PURPOSES

Registration serves a legitimate governmental interest in the collection of the wagering taxes, apart

from any question of the legality *vel non* of the registrant's activities under either State or federal law. Without registration, the occupational tax of fifty dollars would not be assessable, and collection of the ten per cent tax imposed on wagers by 26 U.S.C. 4401 would be virtually impossible. So long as the information [15] obtained is confined to this legitimate tax use, no problem of self-incrimination arises.[16] Even though the lists of those who purchase the occupational tax stamps are made publicly available, the privilege is not violated unless the fact of registration, or the information disclosed thereby, is in some way used in a criminal prosecution for the underlying activities of the registrant. As this Court held in *Ullmann* v. *United States*, 350 U.S. 422, the privilege protects one not from general public opprobrium, but solely from giving information leading to the imposition of criminal penalties.

While it is true that there are various federal

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[15] See the registration form, set out in the Appendix, *infra*. In addition to answering the questions discussed in note 12, *supra*, the registrant is required to give his name, alias or trade name (if any), residence, place of business, and the names of his employees or employer, as may be applicable. If the registrant is a corporation, its officers are to be listed.

[16] It is obvious that no problem of self-incrimination arises at all unless at the time the information is sought, considering "the implications of the question" and "the setting in which it is asked," it would have some tendency to incriminate, *i.e.*, that the "witness has reasonable cause to apprehend danger from a direct answer." *Hoffman* v. *United States*, 341 U.S. 479, 486. The privilege would not, however, prevent the later use of information, innocuous when obtained, because subsequent illegal conduct makes it then relevant. See note 19, *infra*.

crimes relating to gambling,[17] there is no federal statute prohibiting it as such. Since the federal laws merely interdict the use of interstate facilities, or foreign travel, for some activities connected with gambling, it is clear that a person who operates his wagering business within a State is in no danger of federal prosecution if he registers and pays the tax. However, most States make gambling illegal.[18] Thus it is State prosecution that petitioner, and others similarly situated, primarily fear. We submit that the wagering tax and its registration requirement can be preserved for tax purposes if non-tax uses of the information, by either the States or the federal government, are appropriately confined.[19]

B. FULL PROTECTION OF PETITIONER'S PRIVILEGE CAN BE ACCORDED BY PROSCRIBING NON-TAX USES OF THE INFORMATION OBTAINED FROM REGISTRATION

An individual's Fifth Amendment privilege against self-incrimination may be effectuated, in certain sit-

[17] See 18 U.S.C. 1952 (interstate and foreign travel in aid of racketeering enterprise); 18 U.S.C. 1953 (interstate transportation of wagering paraphernalia); 18 U.S.C. 1081–1083 (operation of a gambling ship); 18 U.S.C. 1084 (transmission of wagering information); 18 U.S.C. 1301–1305 (importing or mailing lottery tickets; broadcasting lottery information).

[18] Gambling is illegal in Connecticut, where petitioner lives. Conn. Gen. Stat. Rev., *e.g.*, §§ 53–293 to 53–298. (1965 Supp.), in part set forth in Appendix B of Petitioner's Brief, pp. 32–35.

[19] Assuming that an individual registers and pays the occupational tax, no Fifth Amendment problem would arise if those facts are used in a subsequent prosecution for non-payment of the ten per cent excise tax. The privilege against self-incrimination cannot serve to immunize one from prosecution for future non-compliance with the law; it does not assume that one will choose in the future to commit unlawful acts. See note 16, *supra*.

uations, by focusing either upon the point of attempted *compulsion* or upon the time of attempted *use* of the information obtained. See *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 57 n. 6. This Court has fashioned exclusionary rules in other contexts for what are, in essence, problems grounded on the privilege. See, *e.g., Miranda* v. *Arizona,* 384 U.S. 436; *Haynes* v. *Washington,* 373 U.S. 503; cf. *Mapp* v. *Ohio,* 367 U.S. 643. Usually, no choice of remedy to effectuate the constitutional rights involved is available; in both the coerced confession and *Miranda* situations, the Court could, as a practical matter, focus only upon the point of attempted use. However, in *Murphy,* the constitutional claim could have been satisfied by fashioning a remedy applicable at either of the two points: the initial stage when the questions are asked and the answers sought to be compelled, or at a later point, when and if an attempt is made, in a criminal prosecution, to use the information so obtained. Thus, the Court might have upheld the witness' refusal (in that instance, in a State proceeding) to give answers possibly incriminating under federal law. That resolution, as the Court recognized, would have unduly inhibited the State's interest in securing "information necessary for effective law enforcement" (378 U.S., at 79) through legislative investigation, a legitimate and separate governmental interest apart from that relating to the underlying activities of the particular individual. Compare *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70. Hence, the Court stated (378 U.S., at 79):

> * * * [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. * * *

Similarly, in *United States* v. *Blue*, 384 U.S. 251, this Court, in reinstating an indictment for tax evasion, held just last Term:

> Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * *[20]

Murphy and *Blue* show that when there is a choice as between one or the other point of incidence, the "use point" should be selected if the information sought would serve a legitimate and independent pur-

[20] 384 U.S., at 255. See also *Adams* v. *Maryland*, 347 U.S. 179, "in which the Court suggested that the Fifth Amendment bars *use* by the States of evidence obtained by the Federal Government under threat of contempt," *Murphy* v. *Waterfront Commission*, *supra*, at 75 (emphasis supplied). See also *Irvine* v. *California*, 347 U.S. 128, 141 (Black, J., dissenting). Indeed, the instant case seems to be a stronger one than *Murphy* for adoption of a use-restriction rationale; otherwise, the Court might find itself faced with the solemn task of striking down, at least in part, a congressional enactment.

pose—an accommodation which protects the rights of the private party without sacrificing the interests of the sovereigns concerned. In the *Albertson* case, no such independent purpose was involved. See *supra*, p. 16. Here, however, the alternative course suggested in this part of our brief with respect to the wagering tax registration requirement would serve the federal interest in collection of revenue, while fully protecting the registrant. It is also entirely consistent with the Court's traditional function of defining the scope of the Fifth Amendment privilege, for, as stated in *Adams* v. *Maryland*, 347 U.S. 179, 181:

> * * * a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. * * *

Accord, *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S., at 75.

The assertion of the privilege at the time of the attempted use of the information—the point at which the information might be incriminating—would both honor the privilege and prevent the taxpayer from drawing "a conjurer's circle around the whole matter," *United States* v. *Sullivan*, 274 U.S. 259, 264, by refusing to register and pay the tax at all.[21] On the

[21] In *Sullivan* the Court held that the privilege against self-incrimination could not be relied upon to excuse a failure to file an income tax return. We recognize that there is a clear distinction between the matters involved here—registration and filing of a wagering tax return—and the filing of an income tax return at issue in *Sullivan*. This is so because the income tax return permits reporting of income without specific identification of source. We point out, however, that, assuming that the ap-

other hand, upholding refusal to register "would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim." *Albertson* v. *Subversive Activities Control Board*, 382 U.S., at 79.[22] In practical effect, it would provide exemption from an otherwise valid tax.[23]

C. THE ACCOMMODATION PROPOSED IS A VIABLE ONE

Because petitioner failed to register and failed to pay the special occupational tax, the present case is not a proper one in which to resolve all of the issues that might ultimately arise in the event of a prosecution outside the area of the tax laws. Nevertheless,

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prehension of incrimination in filing a wagering tax return is not insubstantial, a distinction can be drawn between the requirement to register and file a wagering tax return (see *Conti* v. *United States*, No. 330, this Term, *petition for certiorari pending*) and the *payment* of the excise tax on wagering. Payment can be effectuated through means not necessarily having an incriminatory potential. See our briefs in opposition to certiorari in *Grosso* v. *United States*, No. 181, pp. 5–6, and *Conti* v. *United States*, No. 330, pp. 5–6, both this Term, *petitions for certiorari pending*.

[22] While we acknowledge that this case is unlike *Sullivan* in certain respects, we contend that *Albertson* is likewise distinguishable. Neither of those cases, we submit, should therefore be regarded as controlling here. Rather, we suggest, the appropriate result is one that is consistent with both of those decisions, but one that differs from the result reached in either of them.

[23] Although the decision in this case will have no effect on the income tax in general, see note 21, *supra*, it may be controlling in a case involving any other excise or special tax, if the underlying activity of the registrant must be revealed and is in some way repugnant to federal, state, or local law. In cases where that might not be so apparent, the resolution here suggested has great efficacy for it makes a tribunal rather than the taxpayer the arbiter of the merits of the privilege claim.

we think it appropriate to address ourselves to certain of those issues in order to demonstrate that the rationale urged is a viable one for effectuation of the privilege.

We contend that the registration provision should in all events be upheld, but suggest in this part of our argument that, so far as necessary to the achievement of constitutional protections, the States as well as the federal government should be prohibited from making use of information gained from a registrant in connection with a criminal prosecution based on the underlying activity, at ~~most~~ least insofar as acts prior to registration are involved. For example, neither a State, compare *Irvine* v. *California,* 347 U.S. 128, nor the federal government, compare *United States* v. *Zizzo,* 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915, could use the fact of registration as represented by the tax stamp as evidence that a defendant had participated in illegal gambling activities. Moreover, it would seem equally impermissible to use any of the information disclosed as "a link in the chain of evidence" necessary to prosecution, *Hoffman* v. *United States,* 341 U.S. 479, 486; *Blau* v. *United States,* 340 U.S. 159, or for investigatory leads, *Murphy* v. *Waterfront Commission, supra,* 378 U.S., at 78–79, relying on *Counselman* v. *Hitchcock,* 142 U.S. 547, 564, 586. See also *Albertson* v. *Subversive Activities Control Board, supra,* 382 U.S., at 78; *Malloy* v. *Hogan,* 378 U.S. 1, 12–13. And the burden of showing "an independent, legitimate source for the disputed evidence," *Murphy* v. *Waterfront Com-*

mission, 378 U.S., at 79 n. 18, would be on the prosecution.

It is not necessary that the Court attempt to resolve at this time all of the possible issues which might flow from acceptance of our suggested rationale.[24] The framework for their resolution is clearly indicated by the cases upon which we here rely, as well as by those cases involving the application of the Fourth Amendment, *e.g., Wong Sun* v. *United States,* 371 U.S. 471; *Nardone* v. *United States,* 308 U.S. 338; *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385.[25]

D. ON EITHER THEORY PRESENTED BY THE GOVERNMENT, THE JUDGMENT SHOULD BE AFFIRMED

Petitioner was convicted for wilful failure to register and pay the occupational tax,[26] and for conspiracy to avoid its payment. If Point I of our argument is accepted and the *Kahriger* and *Lewis* cases followed, affirmance of the judgment below is clearly dictated.

Although the appropriate disposition of the case presents a more difficult question if our alternative argument is adopted, we suggest that the result should

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[24] We have not discussed, and there is no need for the Court presently to consider, any possible relationship between the privilege against self-incrimination and the so-called "required records" doctrine, see *Shapiro* v. *United States,* 335 U.S. 1. No such issue is involved on the facts of this case.

[25] See also Note, *Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination,* 114 U. Pa. L. Rev. 570 (1966).

[26] Under 26 U.S.C. 7203, which provides in part: "Any person required * * * to pay any * * * tax, or * * * make a return * * *, keep any records, or supply any information, who willfully fails [to do so when required] * * * shall be fined not more than $10,000, or imprisoned not more than 1 year * * *."

be the same. We start from the premise that the conduct was unlawful and known to be so under the authority of this Court's decisions, *i.e., Kahriger* and *Lewis*. A further holding that it was unlawful—albeit one resting on a different rationale—hardly affords a justification or excuse for a prior deliberate flouting of valid laws.

Because the requirements of federal law were plain, *James* v. *United States*, 366 U.S. 213, is inapposite. In that case, the conviction was set aside only because it was thought that the defendant might have relied upon clear authority in his favor. Similarly, the defendant involved in *United States* v. *Murdock*, 290 U.S. 389, relied on the absence of any dispositive ruling on the issue he asserted; indeed, he specifically requested instructions with respect to his good faith belief in the position he took. In contrast, petitioner at no time claimed that his conduct was governed, motivated, or shaped in any way by a good-faith quandary about his constitutional rights. In such circumstances, it can hardly be said that reversal is warranted.[27]

[27] In *Murphy* v. *Waterfront Commission*, *supra*, at 79–80, we realize, the Court set aside the judgment of civil contempt and restored the parties to the situation prevailing at the time when the answers were to be given. Civil contempt is a coercive remedy and its exercise is to be confined to the use of the least possible power to achieve compliance. The Court may well have concluded in *Murphy* that its declaration of the parties' rights and obligations removed any apparent necessity for the sanction. Manifestly, that situation is different from the one presented by a criminal conviction for violations of valid laws. See also *Dennis* v. *United States*, 384 U.S. 855, 864–867, and the cases discussed therein, at 866.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APPENDIX

FORM 11-C
Rev. July 1963

U.S. Treasury Department—Internal Revenue Service

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See Instructions on reverse for time and place for filing return)

Return for period from ..... to June 30, 19.....
(Month, day, and year)

Check one: ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

1. Name: True name .....

Alias, style, or trade name, if any .....

2. Address: Residence .....
(Number and street)

(City) (County) (State)

Business .....
(Number and street)

(City) (County) (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

.....

.....

.....

.....

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name of location	Street address	City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf .....

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☐ No (Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

For District Director's Use Only

.....
(Stamp number)

.....
(Date issued)

.....
(Registration number)

Tax	$.....
Penalty	$.....
Interest	$.....
Total	$.....

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

....., 19.....
(Date)

.....
(Signature)

.....
(State whether individual owner, member of firm, or if corporation officer, give title)

INSTRUCTIONS

1. Who Must File.—Every person who is liable for the 10-percent excise tax imposed by section 4401 of the Internal Revenue Code, and every person who is engaged in receiving wagers for or on behalf of any person so liable, is subject to a special tax of $50 per year imposed by section 4411 of the Code, and must file Form 11–C.

Section 4421 of the Code defines the term "wager" to mean (1) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (3) any wager placed in a lottery conducted for profit.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (1) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under sections 501 and 521 of the Code, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

2. When To File.—(a) First and Renewal Returns and Applications for Registry—Form 11–C serves two purposes: (A) A special tax return and (B) an application for registry. The first return and application for registry must be filed prior to engaging in the activity which results in liability for the special tax on wagering. Renewal returns and applications are required to be filed on or before July 1 of each year thereafter during which taxable activity continues. Changes in ownership which require a return and application for registry, and which result in special tax liability, include the following:

(1) Admission of new members to a firm or partnership.

(2) Formation of a corporation to continue the business of a partnership.

(3) Continuance of the corporate business by a stockholder after the corporation is dissolved.

(b) Supplemental Applications for Registry.—Change of place of business or residence address must be registered with the District Director of Internal Revenue by filing a Form 11–C and checking the block designated "Supplemental Return and Application," stating the new address and the date of change before (i) he engages in any wagering activity at the new address, or (ii) the termination of a 30-day period which begins on the day after the date of such change, whichever occurs first. Any other change must also be registered within 30 days after such change; examples of such other changes include the following: (1) Continuance of the operation of a business of a deceased person, who has paid the special tax, by the surviving spouse or child, or executor or administrator, or other legal representative, (2) Continuance of a business by a receiver or trustee in bankruptcy, (3) Continuance of a business by an assignee for the benefit of creditors, (4) Withdrawal from a firm or partnership of one or more members, and (5) Mere change of corporate name. Failure to comply with these requirements will result in additional tax and penalty. The taxpayer's special tax stamp shall accompany such supplemental application for proper notation by the District Director.

An individual accepting wagers on his own account shall register, by filing a Form 11–C designated "Supplemental Return" not later than 10 days after engaging a new agent or employee to receive wagers, the name, address, and number appearing on the special tax stamp of each such agent or employee. Likewise, an agent or employee receiving wagers on behalf of another shall register the name and address of each additional person by whom he is engaged to receive wagers within 10 days after he is so engaged.

3. Where To File.—The return must be filed with the District Director of Internal Revenue for the district in which is located the taxpayer's office or principal place of business or, if he has no office or principal place of business in the United States, with the District Director for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return must be filed with the District Director of Internal Revenue, Baltimore, Maryland, 21203.

4. Computation of the Special Tax on Wagering.—Special tax liability is computed from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July, the tax to be remitted is computed by multiplying the monthly rate of $4.16⅔ by the number of months remaining in the fiscal year. If the resulting amount involves a fraction, the full cent must be included. Example: If a person first commences business in November, liability should be computed as follows: $4.16⅔×8 (the number of months remaining in the fiscal year) equals $33.33⅓, or $33.34, the amount to be remitted.

5. Penalties.—If the return is not filed with the District Director prior to engagement in the activity which results in liability for the occupational tax on wagering, the penalty prescribed by sections 6651 and 6653 of the Internal Revenue Code may be incurred. In addition, under the provisions of section 7262 of the Code any person who does any act which makes him liable for the special tax, without having paid such tax, shall be fined not less than $1,000 and not more than $5,000. Section 7273 (b) provides that any person who fails to post or exhibit special wagering tax stamps in accordance with section 6806 (c) shall be liable to a penalty of $50 if failure to comply is due to negligence or $100 if due to willful neglect or refusal. For willful failure to file a return or pay the tax, the penalties under sections 7201 and 7203 may be imposed. Under the general provisions of section 1001 of Title 18 of the United States Code, whoever knowingly makes any false or fictitious statement with respect to the payment of the special tax, such as the giving of a false name or address, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

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